STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
NORTHERN DISTRICT

NO. 01-C-244

MARILYN C. SIMPSON AND WILBUR L. SIMPSON, JR.

V.

NET PROPERTIES MANAGEMENT, INC.; NET REALTY HOLDING TRUST; N.H. HERITAGE LIMITED PARTNERSHIP; HERITAGE REALTY MANAGEMENT, INC.; SERVICE UNITED STATES CORPORATION; ADVANCED JANITORIAL SERVICES, INC.; JOHN B. SULLIVAN, JR. CORP.; ROBIE CONSTRUCTION COMPANY; AND T. F. MORAN, INC.

OPINION AND ORDER

LYNN, J.

Presently before the court in this personal injury action are motions to dismiss filed by defendants John B. Sullivan, Jr. Corp., Robie Construction Company and T.F. Moran, Inc. The motions assert that the claims against these defendants are time barred under RSA 508:4-b (1997), the eight year statute of repose applicable to actions "arising out of any deficiency in the creation of an improvement to real property." Although plaintiffs contend that this statute is unconstitutional, I disagree and therefore grant the motions.

Plaintiff Marilyn Simpson allegedly sustained serious injuries on July 9, 2000, when she tripped and fell on a drainage gate in the parking lot of the Bedford Mall in Bedford, New Hampshire. Alleging that the grate had been improperly installed upside down so that it created a dangerous and uneven surface in the parking lot, Simpson and her husband Wilbur instituted this lawsuit

on or about February 23, 2001.[1] The original writ named as defendants Net Realty Holding Trust, the former owner of the mall; Net Properties Management, Inc., the former property manager of the mall; and N.H. Heritage Limited Partnership, the present owner of the mall. By motion to amend granted on October 3, 2001, plaintiffs added Heritage Realty Management, Inc., the present property manager of the mall, as a defendant. By further motion to amend granted on February 14, 2002, plaintiffs added as additional defendants Service United States Corporation and Advanced Janitorial Services, Inc., companies which plaintiffs allege were hired by the mall to provide cleaning services and to inspect, report and remedy hazardous conditions found in the mall parking lot.

The February 2002 amendment also added as defendants several companies which were involved in the Bedford Mall expansion project. Defendant John B. Sullivan, Jr. Corp. served as the general contractor for the project; defendant T.F. Moran, Inc. performed surveying and engineering design work for the project; and defendant Robie Construction Company did site work for the project, including supervision of the installation of the drainage grate at issue. Plaintiffs allege that the drainage grate was originally installed upside down and that it remained in that condition through the date when Mrs. Simpson was injured.

It is undisputed that the mall expansion project began in November 1989 and that the grate was installed on or before March 23, 1990. The project was substantially complete by no later than February 11, 1991, when the Town of Bedford issued a certificate of occupancy.

[1] Wilbur Simpson's claim is for loss of his wife's consortium.

RSA 508:4-b, entitled "Damage from Construction," states in pertinent part:

> I. Except as otherwise provided in this section, all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion[2] of the improvement, and not thereafter.

Because the expansion project was substantially complete more than eight years before plaintiffs initiated suit, defendants Sullivan, Robie and Moran argue that the above statute mandates that the claims against them be dismissed. In opposing dismissal, plaintiffs rely primarily on Heath v. Sears, Roebuck & Co., 123 N.H. 512 (1983).[3] In Heath, the New Hampshire Supreme Court held that the twelve year statute of repose for products liability cases established by RSA 507-D:2, II(a) (1978) violated the equal protection and right to a remedy provisions of part I, article 14 of the New Hampshire Constitution. Following its earlier ruling in Carson v. Maurer, 120 N.H. 925 (1980), the court noted that, although not a fundamental right, "the right to recover for personal

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[2] Subsection II of the statute provides:

> The term "substantial completion means that construction is sufficiently complete so that an improvement may be utilized by its owner or lawful possessor for the purposes intended.

[3] Pointing to an opinion of the New Jersey appellate court, plaintiffs also contend that the drainage grate does not constitute an "improvement to real property" within the meaning of RSA 508:4-b. See Rosenberg v. Town of North Bergen, 279 A.2d 858 (N.J.Super.App.Div. 1971) (holding that the re-paving of a street was not an improvement to real property under a New Jersey statute analogous to RSA 508:4-b). What plaintiffs fail to mention, however, is that this decision was subsequently reversed by the New Jersey Supreme Court. Rosenberg v. Town of North Bergen, 293 A.2d 662, 666 (N.J. 1972) ("We prefer to read the statute, consonant with what we thus judge to have been the legislative intent, as applying to all who can, by a sensible reading of the words of the act, be brought within its ambit."). For the same reasons stated by New Jersey's highest court, I hold that the drainage grate installed in the mall parking lot is an "improvement to real property" and therefore falls within the statute's coverage.

injuries is . . . an important substantive right." 123 N.H. at 524 (quoting Carson, 120 N.H. at 931-32). That being the case, legislative classifications affecting that right must be reasonable, not arbitrary, and have a fair and substantial relation to the object of the legislation. Id. (quoting Carson, 120 N.H. at 932-33); see also Trovato v. Deveau, 143 N.H. 523, 526 (1999). Noting that a hidden defect in a product may not become manifest until years after the product is placed in the stream of commerce, the Heath court found that RSA 507-D:2, II(a) arbitrarily deprived persons injured by defective products of their right to redress twelve years after the product was sold even though no cause of action may have existed as of that time, while other plaintiffs whose injuries did not derive from defective products were allowed to bring suit at any time within six years (now three years) after the cause of action accrued. See 123 N.H. at 525-26.

Plaintiffs read Heath as standing for the proposition that all statutes of repose are per se violative of the New Hampshire Constitution. I reject this view for several reasons. First, there is reason to doubt whether Heath remains good law in light of more recent decisions of the New Hampshire Supreme Court. Specifically, insofar as Heath was predicated on the notion that the legislature cannot constitutionally eliminate a common law cause of action before it has accrued, later cases have substantially undermined this rationale. In Lorette v. Peter-Sam Investment Properties, 140 N.H. 208 (1995), appeal after remand, 142 N.H. 207 (1997), for example, the court upheld a statute, RSA 215-A:34, II (1985), which barred riders of off-highway recreational vehicles (OHRVs) from suing landowners for injuries resulting from risks inherent in this sport, regardless

of any alleged negligence or even recklessness by the landowner. The court found that the statute bore a fair and substantial relation to a permissible legislative objective --- encouraging landowners to make their land available to OHRV users. 142 N.H. at 212. The court reached a similar result in Nutbrown v. Mount Cranmore, 140 N.H. 675 (1996), there upholding RSA 225-A:24 (1989), which precludes suits against ski area operators for injuries resulting from risks inherent in skiing. Given the court's determination in these cases that the legislature had the constitutional power to completely eliminate pre-existing common law causes of action,[4] it is difficult to understand on what basis the court would find that the legislature acted improperly in taking the far more benign step of barring only those claims arising out of improvements to real property which are asserted more than eight years after the improvements are substantially complete. See Petition of Abbott, 139 N.H. 412, 416 (1995) ("part 1, article 14 does not preclude the creation of new causes of action or the abolition of old ones to obtain permissible legislative objectives").

Second, even assuming that Heath remains good law, the supreme court's decision in a case involving an earlier version of the very statute at issue in this case, RSA 508:4-b, demonstrates that the court does not regard statutes

[4] It is true that the statutes at issue in Lorette and Nutbrown only bar causes of action arising out of the inherent risks of the sporting activities involved, and in this sense merely constitute a legislative determination that the persons or entities protected by the statutes are not negligent when someone is injured as a result of such risks. See Nutbrown, 140 N.H. at 680. The important point for present purposes, however, is that these statutes define the inherent risks of the sports in a manner that differs significantly from the way in which the common law (or a jury applying common law principles) may have defined them. See Lorette, 142 N.H. at 212 (court recognized that RSA 215-A:34, II "plainly imposes an incremental restriction of private rights") (internal quotations omitted); Nutbrown, 140 N.H. at 682 (noting that participants in sports other than skiing and OHRV riding "do not assume, as a matter of law, the dangers inherent in those sports"). There is no question, therefore, that these statutes eliminated some causes of action which pre-existing common law would have permitted to be maintained.

of repose as being per se unconstitutional. In Henderson Clay Products, Inc. v. Edgar Wood & Assoc's., Inc., 122 N.H. 800 (1982), the court dealt with the original 1965 version of RSA 508:4-b, which applied only to architects and others who furnished the design, planning or supervision of construction of an improvement to real property. Although the court found that this statute violated the equal protection clauses of the state and federal constitutions, the court did not base its decision on reasoning suggesting that statutes of repose are inherently unfair or unconstitutional. Rather, the court concluded that the statute denied equal protection because of its under-inclusiveness, i.e., the statute drew an irrational distinction between architects, planners and designers, who were relieved of liability six years after performance of their services, and materialmen, laborers and others involved in making improvements to realty, who could be sued within six years after the time their injury-producing wrongful conduct was or should have been discovered. Id. at 801-02.[5]

In the wake of Henderson, the legislature amended RSA 508:4-b in 1990. Laws 1990, 164:2. In addition to increasing the period within which claims could be brought from six to eight years, the present, 1990 version of the statute corrects the specific problem identified in Henderson by expanding the reach of the statute so that it now applies "without limitation" to all parties involved in the "design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of [the] improvement." RSA 508:4-b, I. In

[5] Subsequently, in Antoniou v. Kenick, 124 N.H. 606 (1984), the court held that the defect identified in Henderson rendered the statute void in its entirety, id. at 609, but the court again said nothing suggesting that all statutes of repose are invalid.

light of the 1990 amendment, the statute can no longer be challenged on the grounds of under-inclusiveness.

Third, a substantial majority of courts which have considered statutes similar to RSA 508:4-b have upheld the statutes in the face of constitutional attacks analogous to those leveled by plaintiffs here. See, e.g., Lakeview Boulevard Condo. Ass'n. v. Apartment Sales Corp., 29 P.3d 1249 (Wash. 2001); Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194 (Utah 1999); Gibson v. West Virginia Dept. of Highways, 406 S.E.2d 440, 445 (W.Va. 1991); Leeper v. Hillier Group, 543 A.2d 258 (R.I. 1988); Zapata v. Burns, 542 A.2d 700 (Conn. 1988). In Lakeview, the Supreme Court of Washington found that state's statute of repose for claims arising out of real estate improvements constitutional because, among other objectives, it serves the legitimate purposes of (1) limiting the discovery rule and thereby avoiding the placement of too great a burden on defendants involved in the construction trades and (2) preventing plaintiffs from bringing stale claims where evidence might be lost or witnesses might no longer be available. 29 P.3d at 1253. A number of courts also have noted that such statutes serve the legitimate purpose of protecting architects and builders from the potentially unlimited exposure to liability which results from the abandonment of the privity of contract defense. Gibson, 446 S.E.2d at 446; Zapata, 542 A.2d at 708-09. See also Rosenberg, 293 A.2d at 667-68 (quoting Developments in the Law: Statutes of Limitations, 63 Harv.L.R. 1177, 1185 (1950) ("There comes a time when he (the defendant) ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be

called on to resist a claim when evidence has been lost, memories have faded, and witnesses have disappeared.)). In addition, several courts have pointed to a study which indicated that approximately 93% of claims against architects and builders were brought within six years of a project's completion and 99.6% were brought within ten years of completion. See Gibson, 406 S.E.2d at 447. This study shows that statutes of the kind here at issue are apt to wipe out very few legitimate claims.

The legislative history of the 1990 version of RSA 508:4-b reflects that, in enacting this statute, members of the general court sought to achieve the same legitimate objectives identified above:

> The general court finds that, under current law, builders, designers, architects and others in the building trade are subject to an almost infinite period of liability. This period of liability, based on the discovery rule, particularly affects the building industry and will eventually have very serious adverse effects on the construction of improvements to real estate in New Hampshire. Therefore, it is in the public interest to set a point in time after which no action may be brought for errors and omissions in the planning, design and construction of improvements to real estate. This act is determined to be in the public interest and to promote the balance of interests of prospective litigants in cases involving planning, design and construction of improvements to real property.

Laws 1990, 164:1.

Finally, it is important to recognize a critical distinction between this case and Heath. From all that appears in the decision, the various plaintiffs in Heath would have been left completely without a remedy had the court upheld the statute of repose at issue in that case. The same is not true here. As noted previously, the owner and manager of the mall have been named as defendants, as have two cleaning services to which the owner and manager allegedly

delegated the responsibility for inspecting the property and reporting and correcting defects. The owner and operator of property unquestionably has a duty to maintain and repair the property so as to keep it in reasonably safe condition for those who foreseeably make use of it.[6] Ouellette v. Blanchard, 116 N.H. 552 (1976). To the extent plaintiffs' injuries resulted from a breach of duty by these defendants, plaintiffs are entitled to be compensated by said defendants for their losses. Thus, plaintiffs are not left without a remedy.

In sum, I find that the combined circumstances of (1) the enduring character and long useful life of most improvements to real property and (2) the lack of control over the improvements after they have been completed, provide a reasonable basis for treating claims against those involved in the creation of such improvements differently from claims arising from other causes. I further find that RSA 508:4-b reflects a considered legislative balancing of competing interests, and that it represents a fair and non-arbitrary way of accomplishing the legitimate objectives of sparing those in the building trades from potentially unlimited liability while also preserving the ability to sue during that period when the vast majority of injuries resulting from design or construction deficiencies are likely to accrue. Therefore, I hold that the statute is constitutional.

[6] Subsection VI of RSA 508:4-b makes it clear that the statute of repose is inapplicable to claims made against the other defendants in this case. It provides:

> Nothing in this section shall affect the liabilities of a person having actual possession or control of an improvement to real property as owner or lawful possessor thereof, and nothing contained in this section shall alter or amend the time within which an action in tort may be brought for damages arising out of negligence in the repair, maintenance or upkeep of an improvement to real property.

For the reasons stated above, the motions to dismiss filed by defendants John B. Sullivan, Jr. Corp., Robie Construction Company and T.F. Moran, Inc. are hereby granted.

BY THE COURT:

February 9, 2003

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ROBERT J. LYNN
Associate Justice